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No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This case presents the straightforward question whether *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), and related constitutional principles limit Congress' ability to direct the outcome of one adjudicatory proceeding to the detriment of a single private party while applying to all other like cases a different general rule. Respondents do not address the risk of corruption inherent in case-specific legislation like that here, which the Alaska congressional delegation slipped into a conference bill without debate solely to benefit Alaska refiners. Nor do respondents deny that lower courts continue to struggle with and diverge regarding the application of *Klein* in a variety of contexts – particularly over the meaning of *Klein*'s prohibition against Congress' directing the outcome of particular cases. Instead, respondents principally contend that the particular facts of this proceeding, including its administrative context, should preclude review by this Court, or they simply argue on the merits that *Klein* is limited in a manner that this Court has never resolved. These arguments are without merit, and this Court should grant review of this important separation-of-powers issue that determines whether individuals have a right to have their cases resolved by rules of general applicability rather than by discrete legislative intervention.

ARGUMENT

1. As a preliminary matter, only respondent Petro Star argues that the facts of this case do not even raise the important question presented by the

petition, Petro Star ("PS") Opp. 12-16,[1] a claim that is clearly without merit.

First, Petro Star contends that the provision petitioner challenges ("§ 4412(b)(1)"[2]) "did not 'direct' or 'dictate' a particular result in the FERC proceeding at issue," because FERC "retained substantial discretion to evaluate the equities as it saw fit." PS Opp. 12, 14. FERC, of course, squarely determined that § 4412(b)(1) precluded it from awarding any retroactive relief for periods before February 1, 2000 and rejected (as the ALJ also had done) respondents' equitable arguments that retroactive relief was unwarranted. Pet. App. 165a-192a. Whatever discretion FERC may theoretically have retained to grant *less* relief than Congress indicated, it had no discretion to grant greater relief, including the relief that the ALJ had already determined was otherwise appropriate under law. In this relevant sense, § 4412(b)(1) dictated the outcome of this case, which thus directly sets forth the question presented in the petition.

Second, Petro Star claims that this case involves no "pending adjudication" because administrative agencies do not adjudicate and "[r]atemaking is an essentially legislative act, not an adjudicative one." PS Opp. 16 (internal quotation marks omitted;

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[1] Petro Star itself took a quite contrary position before the D.C. Circuit, where it directly addressed the applicability of *Klein* rather than resting on an assertion that the case did not present the issue for which review is now sought and that was fully litigated below. *See* Joint Brief of Intervenors at 6-9, *Petro Star Inc. v. FERC*, Nos. 06-1166, *et al.* (D.C. Cir. filed May 15, 2007).

[2] Safe, Accountable, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 4412(b)(1), 119 Stat. 1144, 1778 (2005).

alteration in original). Administrative agencies certainly do undertake adjudications, see *infra* at 5-6, and such adjudications can, as here and in an array of federal district court proceedings, address rate issues without acting in a "legislative" capacity. Respondent confuses prospective ratemaking, usually undertaken through rulemaking (and analogized to legislation, see, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947)), with adjudications that apply law to facts in particular cases (and deemed adjudicative, see, *e.g.*, *United States* v. *Fla. E. Coast Ry.*, 410 U.S. 224, 245 (1973); *infra* at 6). Here, an administrative law *judge*, after a lengthy hearing involving witnesses and presentation of additional evidence, resolved ExxonMobil's claim against other private parties by applying existing law to the particular facts before him. See *Trans Alaska Pipeline Sys.*, 108 FERC ¶ 63,030 ¶¶ 2771-2952 (2004); 18 C.F.R. § 385.504 (duties and powers of FERC ALJ at hearing). Indeed, an administrative agency acting in its rulemaking capacity generally cannot provide the kind of retroactive relief originally ordered by the ALJ – and undone by Congress – here. See, *e.g.*, *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 578 & n.8 (1981).

Third, Petro Star states that § 4412(b)(1) "change[s] . . . applicable law" rather than embodies "a direction to reach a particular result under old law," and thus presents no issue related to *Klein*. PS Opp. 15 (citing *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992)). This claim simply asserts an answer to the question presented. It is true that § 4412(b)(1) changed the law, just as the statute set aside in *Klein* also changed the law in a manner that directed the outcome of particular cases. The question presented, however, includes whether a statute that targets a single case and directs its

outcome contrary to the general rule, in the manner undertaken by § 4412(b)(1), is an impermissible "direction" within the scope of *Klein* or a "change in the applicable law" within the scope of *Robertson*. This is clearly an open issue, with strong arguments that *Klein* controls this case and *Robertson* is inapplicable. See Pet. 11-19. In any event this is an issue for the merits, not a reason to deny the petition.

2. The United States and other respondents argue that review is not warranted because *Klein* does not apply beyond Article III courts or to cases decided by Article I adjudicative bodies. See, *e.g.*, U.S. Opp. 10-11 & n.2. This is a startling and incorrect position, and its significance underscores the need to grant review.

Respondents' argument is incorrect for three reasons. First, both this Court in *Klein* and the D.C. Circuit in this proceeding addressed the statute's effect on the powers of the reviewing Article III court as well as the adjudicator that initially applied the statute. See *Klein*, 80 U.S. (13 Wall.) at 144 (statute directs treatment of evidence "both in the Court of Claims and in this court on appeal"); *id.* at 145-46; Pet. App. 4a. In resolving the petition based on its prior decision in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), which dealt with Article III courts, the D.C. Circuit made clear that its holding and interpretation of *Klein* applied equally to both Article I and Article III adjudicators. Pet. App. 4a. This approach and that taken in *Klein* make sense: a statute that directs the results in an adjudication subject to review by an Article III court also has the effect of directing the result on appeal.

Second, *Klein* addressed a statute that directed an initial outcome in the Court of Claims, an Article I court. See *Ex Parte Bakelite Corp.*, 279 U.S. 438, 454

(1929); Br. of WLF as *Amicus Curiae* 20. The United States argues that the Court in *Klein* must have viewed the Court of Claims as an Article III court because, although initially constituted as an administrative body, Congress later modified that body to exercise the powers of a true, "inferior" court. U.S. Opp. 11 n.2. But the language in *Klein* and other authorities cited by the Government simply underscores this Court's focus on whether the Court of Claims carried out judicial functions subject to further review. *Klein* did not decide whether the Court of Claims was an "inferior court" established by Congress pursuant to Article I (like the Tax Court or the Court of Appeals for the Armed Forces), or one established pursuant to Article III (like district courts). This Court resolved that question in *Bakelite*, 279 U.S. at 454-55, and determined that the Court of Claims was an Article I court.

Third, and more fundamentally, respondents fail to recognize the nature of the adjudicative power that Congress vests in administrative agencies and how, for purposes of *Klein*, this power is indistinguishable from that vested in Article III courts. As early as the beginning of the administrative state, Congress determined that administrative agencies can function identically to courts and adjudicate disputes between private parties involving public rights. In the Interstate Commerce Act ("ICA"), which governed the FERC proceeding below[3] and which served as the template for other statutes administered by federal agencies, see *Verizon Comm'n, Inc.* v. *FCC*, 535 U.S. 467, 478 n.3 (2002), Congress provided for the ICC to

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[3] Oil pipelines are regulated under a recodified version of the ICA in effect on October 1, 1977, which FERC administers. *See Frontier Pipeline Co.* v. *FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006).

adjudicate disputes regarding the application of law to fact, even between private parties, and sharply distinguished that power from the agency's rulemaking power. See, *e.g.*, ICA, ch. 104, § 13, 24 Stat. 379, 383-84 (1887); *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R.R.*, 233 U.S. 469, 487 (1914) (1906 amendments to ICA retained Commission's power to adjudicate rate disputes and gave Commission "new power to make rates for the future"). Indeed, Congress provided private litigants with the choice of seeking remedies for identical violations of law before the administrative agency, acting as an adjudicator, or before an Article III court. ICA § 9, 24 Stat. at 382. Similar provisions exist today; for example, a private party claiming that another party has violated the Communications Act may seek damages in federal district court or before the FCC. 47 U.S.C. § 207. Judges in both bodies perform identical functions, and the resulting orders of both are subject to review in an Article III court of appeals. *Klein*'s command that Congress not direct the outcome of a particular case should and does apply equally to each. Compare *Univ. of Tenn.* v. *Elliott*, 478 U.S. 788, 798 n.6 (1986) ("'To the extent that administrative adjudications resemble courts' decisions . . . the law worked out for courts does and should apply to agencies.'") (citation omitted), and *Bell* v. *New Jersey*, 461 U.S. 773, 779-80 (1983) (equivalent finality principles apply to federal trial court determinations and administrative adjudications).

Respondents' theory also produces startling results that underscore the need for review of this case. Under respondents' artificial limitation of *Klein* to initial adjudications by Article III courts, *Klein* would have no application to statutes that direct outcomes

against individual litigants, including in favor of private claimants or the government itself, before any range of adjudicators created by Congress pursuant to powers other than Article III. Congress could, in this view, dictate the import of evidence or otherwise direct the outcome with retroactive effect in specific, formal adjudicative proceedings before the FCC, courts martial (including the Court of Appeals for the Armed Forces), the National Labor Relations Board, territorial courts, the Tax Courts, the Commodities Futures Trading Commission, the current United States Court of Federal Claims, and the District of Columbia courts. Under respondents' theory, such a statute would equally constrain this Court or other Article III courts sitting in review of those adjudications.[4] In relying upon such an extreme theory, respondents merely underscore the importance of the issue presented by the petition and the need for this Court to clarify the bounds of *Klein*. See, *e.g.*, *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378 (1940) (outlining due process limitations on statutes interfering with administrative proceedings).

3. The United States asserts that no "conflict" exists among the courts of appeals because all the cited decisions "sustained rather than invalidated the constitutionality of a challenged statute under *Klein*." U.S. Opp. 15. This is a simple *non sequitur*. While it

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[4] Similarly, the United States argues that review is not warranted because "this is not a case in which Congress is attempting to decide the controversy at issue in the Government's own favor." U.S. Opp. 12 (internal quotation and alteration omitted). This factual distinction hardly supports the conclusion the Government seeks. The fact that Congress is, in this case, "tak[ing] property from [person] A. and giv[ing] it to B," *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), aggravates rather than alleviates the Constitutional difficulty underlying § 4412(b)(1).

is true that no court of appeals since *Robertson* has invoked *Klein* as the basis for declaring a statute unconstitutional, that was not the point of the petition, nor is it the relevant inquiry for this Court. Instead, the petition argued at length that courts of appeals have taken sharply divergent views regarding the scope and import of *Klein*, with several agreeing with petitioner – and disagreeing with the D.C. Circuit – that "Congress may not predetermine the results in any given case," *Crater* v. *Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008), nor may it "tell courts how to decide a particular case." *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). See Pet. 19-23 (collecting cases). In no previous case has Congress acted so blatantly to resolve a private dispute without applying the new rule of law prospectively. Respondents have no good answer to this, and likewise fail to rebut petitioner's showing that disputes over the application of *Klein* continue to bedevil the courts of appeals and have arisen in a range of important contexts. Pet. 21-23.

4. Respondent Petro Star attempts to dismiss petitioner's due process challenge by characterizing it as a fact-bound attack on the wisdom of Congress' choice, PS Opp. 27-28, but that misconstrues the due process interests at issue here. A legislature's action to disturb an adjudicative process, by directing a particular outcome for one case by departing from the general, otherwise applicable rule, deeply harms the equal protection and due process interests that adjudication is particularly designed to protect. See *Klein*, 80 U.S. (13 Wall.) at 145-46. These interests clearly extend to the administrative context. In *Paramino Lumber*, which the United States invokes for other purposes, this Court considered whether

Congress had the power to pass a private act requiring the rehearing of a particular worker's compensation claim. This Court upheld the act as curing a prior administrative defect and as permitting rehearing according to pre-existing law, and concluded that there was no due process violation because the "private act does not set aside a judgment . . . or direct the entry of an award" and instead provides for a new hearing "subject to the provisions of the general act for . . . workers' compensation." 309 U.S. at 378. For those reasons, and because the pre-existing law justified "the same amount due under the award authorized by this act," the Court found "no violation of the due process clause." *Id.* Similarly, the Court concluded that Congress had not invaded "the judicial function." *Id.* at 381; see also *Graham* v. *Goodcell*, 282 U.S. 409, 426 (1931) (act affecting tax proceeding did not violate due process because this was "not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached"); *Forbes Pioneer Boat Line* v. *Bd. of Comm'rs*, 258 U.S. 338, 339 (1922) (Holmes, J.) (finding due process violation in state legislation that reversed challenge to administrative action and thus "take[s] away from a private party . . . money that is due when the act is passed").

This mistake regarding the constitutional underpinnings of the petition also leads the United States to err in equating this case with *National Coalition to Save Our Mall*, 269 F.3d 1092. U.S. Opp. 12-15. The United States concedes that *National Coalition* excluded from its holding acts of Congress that offend particular constitutional provisions, including the Due Process Clause (see 269 F.3d at 1097; U.S. Opp. 13), and the due process and related constitutional

infirmities of § 4412(b)(1) readily distinguish this case from the regulatory action addressed in *National Coalition*.

5. Finally, two respondents (but not the United States) argue that this case is a poor vehicle to address the scope of *Klein* because uncertainty surrounds the statutory construction not of § 4412(b)*(1)*, but of § 4412(b)*(2)*. Williams Opp. 14-16; PS Opp. 28-30. These respondents assert that § 4412(b)(2), which applies to all TAPS quality bank disputes other than this proceeding, is subject to contrasting and unresolved interpretations, some of which (if applied to petitioner) could be less favorable than § 4412(b)(1).

This argument provides no basis for denying the petition. No uncertainty surrounds the relevant statutory provision, § 4412(b)(1), which applies only to this proceeding and which FERC finally concluded required a particular outcome adverse to petitioner. Pet. App. 166a. Section 4412(b)(2) will never be applied to this dispute, and any "uncertainty" surrounding that provision is entirely artificial.[5] That subsection provides that, for all claims other than petitioner's, retroactive relief can extend to "the 15-month period immediately preceding the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding." Pub. L. No. 109-59, § 4412(b)(2), 119 Stat. at 1778-79. Respondents Petro Star and Williams assert that the provision *could* be construed, if hypothetically applied to petitioner, to extend back only to the first FERC

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[5] Similarly, respondent OXY USA claims that it was "not inconceivable" that § 4412(b)(1) could theoretically have encompassed proceedings other than this one, but even OXY USA does not suggest that it in fact did so. *See* OXY USA Br. 4-5, 19-20.

order granting retroactive relief, rather than the first order imposing a quality bank adjustment (which occurred in late 1993, see *Trans Alaska Pipeline Sys.*, 65 FERC ¶ 61,277 (1993)). Williams Opp. 14-16; PS Opp. 28-30. But § 4412(a) defines the term "TAPS quality bank adjustments" without reference to any retroactive relief, and no other basis exists for reading a retroactivity requirement into § 4412(b)(2). Unsurprisingly, respondents OXY USA Inc. and Union Oil, even while observing that FERC has not resolved the issue, candidly concede that they have no quarrel with petitioner's straightforward construction of the plain meaning of the provision. OXY USA Opp. 6.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted.

Respectfully submitted,

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